89- 1585

CASE NO.:

THE SUPREME COURT OF THE UNITED STATES
EIGHTY-NINE TERM

CELIO CASTRO and LARRY FOLTZ,
PETITIONERS,

-versus-

THE UNITED STATES OF AMERICA, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHEN A LESSOR ILLEGALLY TERMINATES LESSEE'S 99 YEAR LEASE AND THEN TRANSFERS TITLE TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT LESSEE HAS NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

II. WHEN A DEBTOR DEFRAUDS CREDITORS IN VIOLATION OF STATE STATUTE BY CONVEYING REAL PROPERTY WHICH IS APPLICABLE TO THE PAYMENT OF A DEBT DUE, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT THE CREDITORS HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

III. WHEN A PARTNER CONVEYS THE REAL PROPERTY HE AGREED WITH HIS PARTNERS NOT TO CONVEY, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT THE PARTNERS HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

IV. WHEN AN EMPLOYER CONVEYS REAL PROPERTY IN VIOLATION OF THE COVENANTS OF A DEFERRED COMPENSATION AGREEMENT, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT CLAIM BY THE UNITED STATES THAT THE EMPLOYEES HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

LIST OF PARTIES

THE UNITED STATES OF AMERICA
Plaintiff, Appellee, Respondent

CELIO CASTRO
Defendant, Appellant, Petitioner

LARRY FOLTZ
Defendant, Appellant, Petitioner

JOSEPH A. VALDEZ, JR., AS RECEIVER APPOINTED BY THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA
Defendant

CLARA FERNANDEZ
Defendant

WARREN ELECTRIC OF KEY WEST, INC.
Defendant

FLORIDA KEYS FIRS STATE BANK
Defendant

BOULEVARD BANK
Defendant

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE FLORIDA KEYS
Defendant

HARRY KNIGHT, AS TAX COLLECTOR FOR MONROE COUNTY, FLORIDA
Defendant

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REFERENCE TO REPORTS OF OPINIONS BELOW

The opinions below have not been published or otherwise officially reported. Copies of all opinions below are contained in the Appendix which accompanies this Petition.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On September 28, 1989, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. On November 6, 1989, the Eleventh Circuit Court of Appeals denied Petitioners' timely filed Motion for Rehearing. This Petition for Writ of Certiorari to that Court is timely filed 59 days thereafter on this 4th day of January, 1990. Thus, this Petition is timely pursuant to Rule 20 of this Court.

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN PERTINENT PART: "... NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION."

STATEMENT OF THE CASE

In 1978, GUSTAVO FERNANDEZ formed Safe Harbor Boat Repairs, Inc. and acquired title to the 23 acres involved herein in the name of that corporation. (R10:311) He then entered into an agreement with the Petitioners, CELIO CASTRO and LARRY FOLTZ, for joint development and shared profit from the land.

The three men retained one of the most sophisticated law firms in Miami to submit their agreement to writing. The law firm assisted the three men in formation of five additional corporations, preparation and recordation of a 99 year lease, and preparation and execution of Deferred Compensation Agreements which forbid conveyance of the land to an outside party. (R12:368-7;

copies are contained in the annexed Appendix.) The desired result was that the Petitioners FOLTZ and CASTRO would be full partners in the land with FERNANDEZ and have all the rights of ownership, fully protected by law, without the present tax liability which would arise if the land was merely deeded to them. (R10:311-14)

In 1980, CASTRO went to prison for possession of marijuana. (R12:411-18) However, although in prison, he retained the rights granted to him by the 99 year lease, the written promise of shared profits, the partnership with FOLTZ and FERNANDEZ, and the Deferred Compensation Agreement.

When it became apparent to FOLTZ that FERNANDEZ was involved with the drug trade, he ceased active involvement with him. However, he retained the rights

granted to him by the written promise of shared profits, the partnership with CASTRO and FERNANDEZ, and the Deferred Compensation Agreement. (R10:311)

To this date, the corporation which held the 99 year lease is in good standing with the Secretary of State of the State of Florida and CASTRO is a stockholder and officer thereof. See, Appendix.

In 1981, FERNANDEZ was arrested in the Northern District of Florida. He was convicted and began serving his sentence. While in prison in 1983, he was indicted in the Middle District of Pennsylvania for eight counts of narcotics trafficking. He faced a possible sentence of 35 years in prison and a $200,000 fine. However, on January 24, 1984, FERNANDEZ and the United States

executed a plea agreement. FERNANDEZ pled guilty to one count of the indictment and assigned all of his interest in the 23 acres of land to the United States. In return, the United States agreed to recommend a five year sentence, concurrent with the sentence already being served, with immediate eligibility for parole, and no fine. The United States also agreed to dismiss the remaining counts of the indictment. (R10:311, Ex. 1)

Although there is no evidence whatsoever that they had any interest in the land, and FERNANDEZ denied that they had any interest, the United States also claimed to have title via judgments of forfeiture of the "beneficial interests" of Antonio Bascaro and Jose Luis Acosta (Northern District of Florida Case nos.

PCR-81-940 and MCR-82-220, respectively).

Prior to the plea agreement between FERNANDEZ and the United States, on January 17, 1984, a State Court action was filed by Appellant CASTRO seeking to protect and enforce his interest in the land. FERNANDEZ was named as a defendant in that action and was served with process on January 20, 1984, prior to entering into the plea agreement with the Government. The United States removed that action to the United States District Court for the Southern District of Florida as Docket no. 84-447-Civ-Eaton, but the case was later remanded to the state Circuit Court. The state Circuit Court had subject matter jurisdiction and personal jurisdiction over the appropriate persons and corporations. On February 25, 1985, it granted Partial

Summary Judgment to CASTRO and FOLTZ finding that the their Deferred Compensation Agreements were legal, valid and binding.

After remand of the case instituted by Petitioners to State Court, because it was unwilling to litigate in the unfamiliar territory of State Court, the United States instituted its own action in the United States District Court for the Southern District of Florida as Docket no. 88-6010 (R1-1-1). Its complaint was styled as an action to quiet title to the 23 acres of land.

Discovery was conducted and various motion were filed. The United States filed a motion for summary judgment (R10-312-1) which was referred to a magistrate for argument and recommendation (R12-387-1). The magistrate entered a report

recommending summary judgment be granted in favor of the United States (R12-401-1), Appellants objected (R12-405-1), the District Court entered its order granting the motion for summary judgment and a judgment in favor of the United States (R14-482-1).

FERNANDEZ didn't steal only from the Appellants. He also stole from the United States on June 12, 1989 when he disappeared with $40,000 of money and an expensive Lincoln Continental, both of which belonged to the United States Government. On that occasion, he had been released from prison and given the money and car in order to set up drug deals for Government agents. He has not been apprehended and the Government's property has not be recovered

FOLTZ and CASTRO appealed from the District Court judgment (R14-495-1) and, on September 28, 1989, the Eleventh Circuit Court of Appeals entered its judgment affirming the District Court, per curiam.

On October 17, 1989, the Appellants filed a timely pro se Motion for Rehearing. The Motion for Rehearing was denied by Order dated November 6, 1989. This timely Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals follows, 59 days later, on this 4th day of January, 1990.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction was had in this case in the first instance pursuant to 28 U.S.C. 1345 because the United States was the Plaintiff.

REASONS FOR GRANTING THE WRIT

The underlying issue here is one of the most ignored but most important facing our nation and judicial system today. In this case, the facts are so clear and extreme that the severity of the situation is obvious.

The property involved is one incredible piece. Essentially, it's a small island, connected to the highway and surrounded by deep water, just north of Key West, Florida. One gorgeous piece of land and someone or several people employed by the United States of America became convinced that the United States just had to own that property, no matter what.

Something like the character, Crockett, in the TV series "Miami Vice" just had to take that beautiful Mazerati from the smugglers, no matter what, these

United States employees had to have this land. In order to get it, they made a deal with the criminal Fernandez for his one-third interest and then sued the Petitioners (and others) in a quiet title action in order to obtain Petitioners' two-thirds interest without compensation of any kind. In the law suit, the word "drugs" was bandied about liberally and on each occasion, the Petitioners, their rights, and the Constitution of the United States were taken less and less seriously. Soon, even Petitioners' own counsel were not taking them or their case seriously. To the point that Petitioners' attorneys failed to argue any of the real issues and failed to even mention the Constitution of the United States. Petitioners fired their counsel during the Appeal and filed a pro se Petition for Re-Hearing to the appellate

court.

The biggest problem seems to be that persons from all walks of life, even those who are officials of the United States Government, have become so intoxicated by the greed which accompanies the drug trade that, when the drug infection has sufficiently spread in any situation, it appears appropriate to disregard even the most basic Constitutional rights of innocent citizens in order to acquire the ripe spoils.

If the United States is allowed to nullify Petitioners' Constitutional rights to their property, or just compensation in exchange therefor, merely because the claim of the United States to the property originated in the unclean hands of a drug smuggler, then we have lost the drug war. Indeed: we will have lost everything.

The Fifth Amendment taking issue was not raised in the District Court or on appeal. It was for the first time argued in the pro se Petition for Re-Hearing in the Eleventh Circuit. However, because it is such a significant matter of general impact and injustice would result, the issue must not be deemed waived. In Re Howell, 731 F.2d 624, 627 (9th Cir. 1984), cert. den. Howell v. State Board of Equalization of Calif., 105 S.Ct. 330, 469 U.S. 933 (1984); Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). The Court may even sua sponte notice an issue that has not been raised by any party in any court. United States v. Western P. R. Co., 352 U.S. 59, 1 L.Ed.2d 126, 77 S.Ct. 161 (1956); Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S.313, 28 L.Ed.2d 788, 91

S.Ct. 1434 (1971); Schlesinger v. Councilman, 420 U.S. 738, 43 L.Ed.2d 591, 95 S.Ct. 1300 (1975). It must also be remembered that, until the District Court case herein was concluded, there was no taking; all that existed was a inchoate taking. It was not until the District Court rendered judgment that the taking became complete.

In addition to the Constitutional dimension of the issue, the issue is highly significant because it concerns extremely valuable property. Throughout modern history, it has been recognized that a man's property is sacrosanct, that governments will tend to take property, and that it a great wrong for them to do so.

> A Prince, as I have said before, sooner becomes hated by being rapacious and by interfering with the property and with the women of his

> subjects, than in any other way. From these, therefore, he should abstain. For so long as neither their property nor their honour is touched, the mass of mankind live contentedly, ...

Machiavelli, The Prince, Ch. XIX "That A Prince Should Seek to Escape Contempt and Hatred." This is especially true when the taking is not compelled for the public good and just compensation has not been paid. It matters not that there is a "reason" to take the property. As Machiavelli also noted,

> pretexts for confiscation are never to seek, and he who has once begun to live by rapine always finds reasons for taking what is not his; ... .

Machiavelli, The Prince, Ch. XVII "Of Cruelty and Clemency and Whether It Is

Better to Be Loved or Feared."

It is because this matter is so important, to the rights of the citizenry and well as the continued integrity of a government, that it was included in the Fifth Amendment to the United States Constitution: "... nor shall private property be taken for public use, without just compensation."

The property that the Government took without just compensation from the Petitioners herein is extensive. It includes: (a) the 23 acres of real property; (b) the 99 year lease from Safe Harbor Boat Repairs, Inc. to Safe Harbor Marina, Inc.; (c) the assets of the partnership/joint venture of Fernandez, Foltz and Castro; and (d) the deferred compensation due from Safe Harbor Boat Repairs, Inc. to Foltz and Castro

pursuant to the deferred compensation agreement. Each of these items of property will be dealt with separately, below.

A. The 23 Acres of Land:

The Petitioners' rights to the 23 acres of real property should be protected by Florida's fraudulent conveyances statute. However, the District Court and Magistrate erroneously concluded that Petitioners were claiming that they, as unsecured creditors, have been defrauded by the United States, and therefore, the deed is void. In truth, the Petitioners claim that they have been defrauded by Gustavo Fernandez and by Safe Harbor Boat Repairs, Inc., and therefore, the deed to the United States is void.

The law of fraudulent conveyance is not concerned with whether the transferee has improper motives; its only concern is with the intentions of the transferor:

> [t]o constitute a fraudulent conveyance, there must be a creditor to be defrauded,, a debtor intending fraud, and a conveyance of property which is applicable by law to the payment of the debt due.

Bay View Estates Corp. v. Southerland, 154 So. 894, 900 (1934) (emphasis added). All three of those elements are present here. Appellants Castro and Foltz are creditors to be defrauded. Fernandez clearly intended to defraud them when he conveyed a property worth several million dollars in exchange for $10 and 45 years of his life.

As part of the transaction between Fernandez, Foltz and Castro, Safe Harbor

Boat Repairs, Inc. (of which Fernandez was the only shareholder) gave a 99 year lease to the real property to Safe Harbor Marina, Inc. of which all three men were shareholders and then, later, only Fernandez and Castro were shareholders. Then, in 1982, Fernandez alone, without the consent of the other shareholder, Castro, purported to cancel that lease. This was an illegal cancelation pursuant to Florida law. Without the 99 year lease to the property, Safe Harbor Marina, Inc. had no assets. Florida Statute 607.241 requires a specific procedure when there is to be a "sale, lease, exchange, or other disposition of all, or substantially all, the property and assets of a corporation." The board of directors must adopt a resolution, there must be a meeting and vote of the

shareholders after written notice to all shareholders. Only if the shareholders vote to do so, may the asset or assets be sold, leased, or exchanged. Schwadel v. Uchitel, 455 So.2d 401, 402-03 (3d D.C.A. Fla. 1984). The cancelation of the 99 year lease clearly destroyed the means to accomplish the purpose and object for which Safe Harbor Marina, Inc. was incorporated. Thus, the cancelation without notice to the shareholder Castro was in violation of Fla. Stat. 627.241.

C. The Partnership/Joint Venture:

The United States concedes as undisputed the fact that Fernandez, Foltz and Castro intended to form a partnership. See, Brief of the Appellee United States at 21 in annexed Appendix. There is little difference in Florida law between a partnership and a joint

venture. Often, any distinction becomes completely blurred. Elting Center Corp. v. Diversified Title Corp., 306 So.2d 542 (3d D.C.A. Fla. 1974). After forming this partnership/joint venture intention during 1978 and 1979, the parties employed one of the best, most sophisticated law firms in South Florida and asked them to draw up the necessary paperwork. Unfortunately, the attorneys sought to do more for the clients than was required; they sought to create the equal partnership/joint venture without incurring any present tax liability. It is due to that overreaching by the attorneys that confusion has arisen. However, a partnership or joint venture was, in fact, created. A total of six corporations were formed. One corporation wholly owned by Fernandez

gave a 99 year lease to the real property to a corporation owned by all three partners/joint venturers. Written agreements were entered into which gave them equal rights to the value of the assets. Money was borrowed and mortgages were executed and personally guaranteed. The result of the entire transaction was "an agreement to share in profits and losses and to share assets and liabilities of the business." That alone, is sufficient to comprise a partnership under Florida law.

If the relationship was not a partnership, it was certainly a joint venture. Hyman v. Regenstein, 222 F.2d 545 (3d D.C.A. Fla. 1955); Ellison v. Riddle, 166 So.2d 840 (3d D.C.A. Fla. 1964). It is irrelevant that the device of corporations was used as part of the

joint venture. Granik v. Perry, 418 F.2d 832 (1st D.C.A. Fla. 1969).

A major source of error below was consideration of the Deferred Compensation Agreement alone when that document was only one facet of a complex relationship and transaction which included the 99 year lease and joint personal liability for the payment of mortgages. The parties intended a partnership or joint venture and that intention is what ultimately determines whether a partnership or joint venture was created. Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958), cert. den. 79 S.Ct. 589, 359 U.S. 913, 3 L.Ed.2d 575. It is clear that the various corporations were merely mechanical devices for running the partnership/joint venture and that the corporations formed a single

whole with the partnership/joint venture. Thus, looking at a single corporation and a single document has only distorted the matter and caused an unjust result. Fortugno v. Hudson Manure Co., 144 A.2d 207 (Ap. Div. N.J. 1958). This mistake caused the District Court to believe that the Petitioners had not performed under the Deferred Compensation Agreements.

D. The Deferred Compensation:

The District Court found that the Deferred Compensation Agreements "failed as contracts for lack of mutuality." See, Order of March 11, 1987 at 7, in attached Appendix. However, the District Court had no right to rule upon the validity of the Deferred Compensation Agreement because the matter was res judicata and was barred by the doctrine of collateral estoppel.

In 1985, the United States was the sole shareholder of the corporation known as Safe Harbor Boat Repairs, Inc. That corporation was a Defendant in the action known as Celio Castro, et al, v. Safe Harbor Boat Repairs, Inc., et al, Circuit Court of the 16th Judicial Circuit of Florida, Case no. 84-35-CA-17. On February 25, 1985, that court found that each of the Deferred Compensation Agreements "was legal, valid and binding when entered into by and between the parties." That judgment was recorded in the Official Records of Monroe County Florida on February 26, 1985, at Official Record Book 934, Page 1320.

The United States had notice of that action since a date prior to becoming the shareholder of the corporation and the ostensible owner of the land. See, Brief

of the Appellee United States, at page 9. In fact, the United States removed that action to the United States District Court for the Southern District of Florida as Docket no. 84-447-Civ-Eaton, but the case was later remanded to the state Circuit Court. Thud, there is no doubt that the state Circuit Court had subject matter jurisdiction. It also had personal jurisdiction over the corporation Safe Harbor Boat Repairs, Inc. It is only as the shareholder of that corporation and as the successor in interest and title to that corporation that the United States is involved in this matter. The issue here is the same as it was in the state court: whether the Deferred Compensation Agreement was a valid contract when the parties executed it. The issue was fully litigated and

was not only "critical and necessary" to the state court judgment, it was the only issue reached.

It does not matter that the state court suit was initiated by Petitioners against Safe Harbor Boat Repairs, Inc. before it and its property were sold to the United States. It also is irrelevant that this suit is by the United States to quiet title to the property it received from Safe Harbor Boat Repairs, Inc. The issue may not be relitigated and is barred by collateral estoppel. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). It is the corporation that owes the deferred compensation to the Petitioners and when the United States acquired the corporation it acquired that debt also. Rockney v. Blohorn, 877 F.2d 637 (8th

Cir. 1989).

WHEREFORE, PETITIONERS CELIO CASTRO AND LARRY FOLTZ pray this Court grant their Petition for Certiorari to the Eleventh Circuit Court of Appeals.

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89- 1395

Supreme Court, U.S.
FILED
JAN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.:

THE SUPREME COURT OF THE UNITED STATES
EIGHTY-NINE TERM

CELIO CASTRO and LARRY FOLTZ,
PETITIONERS,

-versus-

THE UNITED STATES OF AMERICA, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE CIRCUIT COURT OF THE 16th
JUDICIAL CIRCUIT IN AND FOR
MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 84-35-CA-17

CELIO CASTRO, ET AL,
Plaintiff,

vs.

SAFE HARBOR BOAT REPAIRS, INC.,
AT AL.,
Defendants,

PARTIAL SUMMARY JUDGMENT

Plaintiffs, Celio Castro and Larry Foltz, having moved this Court on December 19, 1984, for a Partial Summary Judgment, and the Court having held a hearing on February 19, 1985, and counsel being before the Court, and having heard argument of counsel, and the record before the Court that there is no issue as to any material fact, and that the Plaintiffs are entitled to Partial

Summary Judgment as a matter of law, it is therefore

ORDERED AND ADJUDGED:

1. That Partial Summary Judgment is Granted to the Plaintiffs and limited to the Deferred Compensation Agreement, entered into between the parties and attached to the Motion for Partial Summary Judgment as Exhibit A, was legal, valid and binding when entered into by and between the parties.

2. That all other matters will be dealt with subsequently by the Court.

DONE AND ORDERED in Chambers, at Key West, Florida, this 25th day of February, 1985.

Helio Gomez

Circuit Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1846-Civ-ATKINS

UNITED STATES OF AMERICA, Plaintiff, vs. CELIO CASTRO, LARRY FOLTZ, Defendants.	REPORT OF UNITED STATES MAGISTRATE

This is a suit by the government to quiet title pursuant to 18 U.S.C. S. 1345, against adverse claimants including Celio Castro and Larry Foltz, involving a twenty-three acre multi-million dollar deep water marina on Stock Island, on the Overseas Highway to Key West. The government also seeks declaratory relief and a permanent injunction against alleged trespass to land by the defendants. The United States has filed a motion for summary judgement against

the defendants Celio Castro and Larry Foltz. This motion has been referred to the undersigned pursuant to 28 U.S.C. S. 636(b)(1)(B).

Oral argument was heard upon these motions on January 30, 1987.

The government's claim to the tract is based on a series of conveyances from private parties to the United States.

On March 30, 1982, a judgment of forfeiture was entered in the Northern District of Florida against Antonio Bascaro's beneficial interest in the land. U.S. v. Antonio Bascaro, Case No. PCR-81-940 (N.D. Fla.)

On December 20, 1982, a criminal judgment was entered in the Northern District of Florida against Jose Luis Acosta's beneficial interest in the land. U.S. v. Jose Luis Acosta, MCR 82-220

(N.D. Fla.)

On February 14, 1984, Gustavo "Pepito" Fernandez executed two quitclaim deeds to the United States. These deeds were recorded in Monroe County. Fernandez was under indictment in the Middle District of Pennsylvania, and conveyed his ownership in the property in connection with a plea agreement executed on January 24, 1984. The quitclaim deeds conveyed all interest held by Safe Harbor Boat Repairs, Inc., of which Fernandez was the sole shareholder, to the United States. The defendants have not contested the claim of the government that Safe Harbor Repairs, Inc., possessed record title to the property on February 14, 1984, and that Fernandez was the only shareholder of record, with the right to convey title.

The District Judge on September 28, 1984, granted the government's request for a preliminary injunction against Joseph Valdes, Jr., a state court appointed receiver, holding that the government has made a strong prima-facie showing that it holds record title to the property and that Safe Harbor Boat Repairs Inc. itself is wholly owned by the United States, due to the conveyance by Fernandez of all his corporate shares in that corporation to the United States on February 7, 1984. The preliminary injunction was affirmed on appeal. Celio Castro v. Safe Harbor Boat Repairs Inc., et al, 772 F.2d 917 (11 Cir. 1985).

The defendants Celio Castro and Larry Foltz propound three theories upon which they seek to establish their interests in the tract. They argue first

that the quitclaim deeds taken by the government in its plea agreement with Gustavo Fernandez are void because they were executed while the government had knowledge of the claims of Castro and Foltz to the property and were therefore an attempt by the government to defraud Castro and Foltz, who were creditors of Safe Harbor. The defendants next argue that oral agreements were entered into by Castro, Foltz, and Fernandez, in which Fernandez agreed to transfer one-third interest each in the tract to Castro and Foltz, in return for their agreement to develop the land. The third claim of the defendants is based upon two Deferred Compensation Agreements executed on August 10, 1979, by Castro, Foltz and Safe Harbor, which the defendants contend constitute enforceable encumbrances on

the street.

The government moves for the summary judgement, claiming that there is no remaining genuine issue of material fact and that it is entitled to judgment as a matter of law, because assuming all contested facts to be decided favorable to the defendants, each of their arguments must nevertheless fail as a matter of law.

Each of the claims of the defendants will be treated, seriatim.

Castro and Foltz first argue that the government took the quitclaim deeds from Fernandez knowing of the claim of Castro and Foltz to the tract and therefore in fraud of the lawful creditors of Safe Harbor Boat Repairs, Inc. As stated previously, Safe Harbor held record title to the tract and

Fernandez was the only shareholder of the Corporation.

The government contests the claim that it is legally accountable for knowledge of the existence of the Castro-Foltz claims, but for purposes of this motion it will be assumed that the defendants are correct as to the facts essential to this issue.

Nevertheless, there is no indication of fraud in this record. It is assumed, without deciding, that the government knew Castro and Foltz had claims to the land. The uncontrovertible facts are that on February 14, 1984, the government took quitclaim deeds from Gustavo Fernandez to whatever interest he held in the land. He certainly held at least one-third interest, even if the defendant's claims are valid. The

government believes the arguments upon which Castro and Foltz claim interests are invalid, however, and on August 7, 1984, this quiet title action was filed so that judicial determination of the rights of the various claimants to the land could be had.

The defendants argue that the government should have intervened in a civil suit pending in the Circuit Court of Monroe County involving the agreements, and that its failure to do so indicates bad faith. Neither the United States nor any litigant, however, is required to forego its remedies in one lawfully available forum and seek relief in another.

There appear to be no factual issues outstanding which, resolved favorably to the defendants, would support a claim of

fraud against the United States.

The defendants next argue that oral agreements were entered into by Castro, Foltz, and Fernandez, in which Fernandez agreed to transfer one-third interest each in the land Castro and Foltz, in return for their agreement to develop the land. This alleged agreement, however, is also the subject matter of the Deferred Compensation Agreements, which contain an integration clause providing that they are sole repository of the parties agreements with respect to their subject matter. Moreover, the Florida Statue of Frauds prevents the creation of an interest in real property, or of obligations not to be preformed within one year, by oral agreement. Fla.Stat. S. 689.01; S. 725.01.

At oral argument counsel for the defendants was unable to suggest theories upon which the integration clause and the Statue of Frauds could overcome in this case so that the facts surrounding the alleged oral agreements might become material. For its part, the government argued that as to any possible oral agreements it would be a bona fide purchaser without notice. In the absence of a prima facie showing indicating admissibility of the oral agreements, this contention need not be reached.

The third and strongest argument of the defendants is that the Deferred Compensation Agreements executed on August 10. 1979, by Castro, Foltz, and Safe Harbor, constitute enforceable encumbrances on the tract.

The identical six page agreements state that foltz and Castro are willing to continue in the employ of the company in exchange for specified benefits, including one-third of the proceeds of the sale of the assets of Safe Harbor. The company in turn agrees not to sell any of its assets without the defendants' approval, and that in the event of any sale, the defendants will each receive one-third of the purchase price.

The agreements further state that the defendants' rights are those of unsecured creditors of the Company, and that no corporate funds or assets will be set aside by Safe Harbor Boat Repairs, Inc. for the purpose of performing the agreements.

The government argues that the Deferred Compensation Agreements create

no enforceable interests in the tract because no equitable mortgage or lien was created by the terms of the agreements and because the agreements fail as employment contracts for lack of mutuality of obligation or consideration.

The agreements were drafted for Castro and Foltz by attorneys Martin Kald and Brent Klein, who testified in deposition that the agreements were drafted as Deferred Compensation Agreements to defer the date of the taxable event, and therefore defer taxes charged to their clients.

Under Florida law there are two ways to create an equitable lien. Such a lien may be based upon 1) special circumstances requiring a lien to satisfy justice, or unjust enrichment, or 2) a written contract evidencing an intent to

charge property with a particular debt. Hobco, Inc. v. Tallahassee Associates, ___F.2d____ (11 No. 85-3897, Jan. 8, 1987).

In this case there is no claim of unjust enrichment.

Nor do the Deferred Compensation Agreements appear to constitute a written contract evidencing an intent to charge the tract with a particular debt. By the terms of the agreements at numbered paragraph seven, the rights of the defendants are those of unsecured creditors of Safe harbor Boat Repairs, Inc.

An agreement to encumber or alienate property does not give rise to an equitable mortgage or lien. Hansen v. Five Points Guaranty Bank, 362 So.2d 962,964 (Fla. 1st Dist. 1978).

It does not appear that the agreements executed by Castro and Foltz created any immediate interest in the land either by the creation of an equitable mortgage or lien, or by their terms. Moreover, the transactions failed as gifts, for lack of total surrender of dominion and control or intent to pass immediate title. Ritter v. Shames, 452 So.2nd 1057,1059 (Fla. 3 Dist. 1984).

The defendants of course argue that even lacking a mortgage or equatable lien interest, or a valid gift, they are entitled under the terms of the contracts, which they characterize as employment contracts, to an interest in the land. To this argument the government responds that the contracts fail for lack of consideration and illusoriness, because the defendants did

not agree to remain in the employ of Safe Harbor Boat Repairs Inc. for any specified period.

The relevant clause in the agreements essentially states that Castro and Foltz are willing to continue in the company's employ. The government argues that because Castro and Foltz could leave the company's employ at will, this option to fail to perform causes the contract to fail for lack of consideration.

The government cites Jankins v. City Ice & Fuel Co., 160 So. 215,218 (Fla. 1935), for the proposition that a contract which by its terms reserves the privilege of alternative conduct fails for want of consideration. More specifically, under Florida law an agreement to remain employed for an indefinite period of time with the right

to terminate at will is lacking in mutuality. Hope v. National Airlines, 99 So.2nd 244 (Fla. 3 Dist. 1958).

According to the defendants, in early 1979 Gustavo Fernandez, Celio Castro, and Larry Foltz joined forces to develop a marina operation on Stock Island, Key West, Florida. Fernandez was to provide the land, while Foltz and Castro were to contribute funds and expertise in building the marina. The Deferred Compensation Agreements were set up to compensate the defendants, while minimizing adverse tax consequences.

Castro and Foltz allege that they performed their obligations to develop the marina in 1979 and that after the agreements were executed on August 10, 1979, they continued to improve the property.

There are issues of fact as to whether any work done in the furtherance of the agreements at issue in this case, or whether the work, if any, was actually done in connection with five separate corporations related to Safe Harbor Boat Repair Inc. Castro and Foltz were shareholders in the five related corporations, but not in Safe Harbor Boat Repairs Inc., the "mother corporation."

The issues of fact concerning performance by Castro and Foltz wold be material only if there were in fact binding agreements as a matter of law. As previously discussed, the agreements do not require any specific performance by the defendants and therefore fail as contracts for lack of mutuality whether or not work was done in furtherance of the agreements.

The record does not reveal the existence of any remaining genuine issue of material fact as to the claims of Castro and Foltz, and it appears that the government is entitled to summary judgment against them as a matter of law.

The parties may file objections to this report with the District Judge within ten days after receipt of a copy of the report.

Dated: February 2, 1987

_____

UNITED STATES MAGISTRATE

cc: Steven Zukoff, Esquire
William Meadows, Esquire
United States Attorney

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT SOUTHERN DIST. OF FLORIDA

Plaintiff,

vs. No. 84-1846-Civ-ATKINS

CELIO CASTRO, LARRY FOLTZ, et al.,

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This cause is before the court on the government's motion for summary judgment against defendant's Celio Castro

and Larry Foltz. The motion was referred to Magistrate Charlene Sorrentino pursuant to 28 U.S.C. S. 636 (b) (1) (B).[1] At this time, I have reviewed the motion, memoranda, the Report and Recommendation of the Magistrate, the objections to the report, and I have considered counsel's arguments, which were asserted during the February 25, 1987 hearing on this matter. After carefully considering the motion, it is

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is GRANTED.

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[1] This case is rather complex, and I appreciate the able assistance provided by Magistrate Sorrentino in resolving this matter.

I. STATEMENT OF THE CASE

The government initiated this suit to quiet title pursuant to 18 U.S.C. S. 1356, against adverse claimants including CELIO CASTRO and LARRY FOLTZ. The property consists of a twenty-three acre multi-million dollar deep water marina on Stock Island located on the Overseas Highway to Key West. The government also seeks declaratory relief and a permanent injunction against alleged trespass to land by the defendants.

The government's claim to the tract is based on a series of conveyances from private parties to the United States. On March 30, 1981, a judgment of forfeiture was entered in the Northern District of Florida against Antonio Bascaro's beneficial interest in the

land. UNITED STATES V. ANTONIO BASCARO, Case No. PCR-81-940 (N.D. Fla.). Then, on December 20, 1982, a criminal judgment was entered in the Northern District of Florida against Jose Luis Acosta's beneficial interest in the land. United States v. Jose Luis Acosta MCR 82-220 (N.D. Fla.). Finally, on February, 14, 1984, Gustavo "Pepito" Fernandez executed two quitclaim deeds to the United States. These deeds were recorded in Monroe County. Fernandez was under indictment in the Middle District of Pennsylvania, and conveyed his ownership in the property in connection with a plea agreement executed on January 24, 1984. The quitclaim deeds conveyed all interest held by Safe Harbor Boar Repairs, Inc., of which Fernandez was the sole record

shareholder, to the United States.[2]

On September 18, 1984, I entered a preliminary injunction against Joseph Valdes, Jr., a state court appointed receiver, holding that the government had made a strong prima-facie showing that it holds record title to the property and that Safe Harbor Boat Repairs Inc. itself is wholly owned by the United States, due to the conveyance by Fernandez of all his corporate shares in that corporation to the United States on February 7, 1984. The preliminary injunction was affirmed on appeal. Celio Castro v. Safe Harbor Boat Repairs, Inc., 772 F.2d 917 (11 Cir. 1985).

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[2]Defendants do not contest the government's assertions that Safe Harbor Repairs, Inc. possessed record title to the property on February 14, 1984, and that Fernandez, as the only shareholder of record, had the right to convey title.

Defendants have asserted several theories upon which they seek to establish their interest in the property. First, they claim that the quitclaim deeds, held by the government, are void because the government attempted to defraud Castro and Foltz who were creditors of Safe Harbor. Second, defendants argue that Fernandez orally agreed to transfer a one-third interest to each defendant in return for their agreement to develop the land. Third, defendants state they are each entitled to a one-third interest in the land based upon two deferred compensation agreements executed on August 10, 1979, by Castro, Foltz, and Safe Harbor Boat Repairs, Inc. Finally, defendant urge that they are entitled to an equitable lien against the property.

After reviewing the record, the motion, memoranda, and after hearing oral arguments by counsel on January 30, 1987, Magistrate Sorrentino determined that there were no genuine issues of material fact as to the claims of Castro and Foltz, and that the government was entitled to summary judgement against them as a matter of law. Each side filed their objections to the report and were allowed to present oral arguments in support of their conflicting positions.

II. DISCUSSIONS

Following the Magistrate's example, each of the points will be treated seriatim.[3]

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[3]Magistrate Sorrentino also found that the asserted transactions failed as gifts based upon the lack of surrender of dominion and control or intent to pass

A. Fraudulent Conveyance

Defendants argue that the government took the quitclaim deeds from Fernandez knowing that the defendants had claims against the property. Thus, they assert that the conveyance was intended to defraud the lawful creditors of Safe Harbor Boat Repairs, Inc. However, the magistrate found that there were "no factual issues outstanding which, resolved favorably to the defendants, would support a claim of fraud against the United States." I agree with the magistrate.

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immediate title. See Ritter v. Shames, 452 So.2d 1057, 1059 (Fla. Dist. Ct. App. 1984). Because this finding has not been challenged and appears to be correct, no further discussion is necessary.

After carefully considering counsel's contentions, I am convinced that defendants cannot maintain their action for fraudulent conveyance. Fernandez gave the government a quitclaim deed. Clearly, this was sufficient to transfer at least the one-third interest he held, even if the defendant's claims are valid. More importantly, however, the nature of the quitclaim conveyance is significant. The government received whatever interest was held by the transferor, no more, no less. Thus, if defendants have a valid interest, then it was not transferred by the quitclaim deed. In short, the conveyance, structured as it was, cannot have affected defendants. Instead, their claim succeeds or fails based upon the merits of those theories and facts which

have been offered to show that defendants hold a valid interest in the property.

B. Oral Agreements

Defendants argue that Fernandez, orally agreed to transfer a one-third interest in the land to each of them, in return for their agreement to develop the land. However, during oral argument before the Magistrate, defense counsel was unable to suggest any legal theories which would avoid the integration clause of the written agreements concerning the same conveyance.[4] Similarly, counsel was

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[4] The Deferred Compensation Agreement provides:

> This Agreement sets forth all the premises, agreements, conditions, understandings, warranties, and representations among the parties hereto with respect to the subject matter hereof, and there are no

unable to suggest any basis to overcome the Statue of Frauds. See Fla. Stat. §. 689.01; §. 725.01.[5] Thus the Magistrate concluded that defendants could not claim an interest in the land under this theory, I agree.

C. An Equitable Lien

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promises, agreements, conditions, understandings, warranties or representations, oral or written, expressed or implies, among them other than as set forth herein.

[5] Fla. Stat. § 689.01 requires that:

No estate or estate of freehold ... shall be created, made, granted, transferred or released in any other manner than by instrument in writing....

Similarly, Fla. Stat. § 725.01 requires that the instrument be signed by a party against whom enforcement is sought and that it contain all the essential terms of sale (without result to parol evidence). See e.g., Fox v. Sales at Laguna Club Development Corp., 403 So.2d 456, 458 (Fla. 3d DCA 1981).

Defendants contend that equitable considerations justify the imposition of an equitable lien. Under Florida law there are two ways to create an equitable lien. Such a lien may be based upon 1) special circumstances requiring a lien to satisfy justice, or unjust enrichment, or 2) a written contract evidencing an intent to charge property with a particular debt. Hobco, Inc. v. Tallahassee Associates, ____ F.2d ____ (11 No. 85-3897, Jan. 8, 1987).

The Magistrate found that defendants could not fulfill the Hobco standards. She noted that defendants had not asserted a claim for unjust enrichment. Furthermore, she found that the Deferred Compensation Agreements did

not constitute a written contract evidencing an intent to charge the tract with a particular debt. By the same terms of the agreements at numbered paragraph seven, the rights of the defendants are those of unsecured creditors of Safe Harbor Boat Repairs, Inc. Finally, she relied upon Hansen v. Points Guarantee Bank, 362 So.2d 962 (Fla. Dist. Ct. App. 1978). There, the court held that an agreement not to encumber or alienate property does not give rise to an equitable mortgage or lien. Id. at 964.

After reviewing counsel's arguments, I agree with the Magistrate once more. Hansen strongly supports the government's position. In addition, for reasons which will be discussed at

greater length in the next section, I find that defendants cannot satisfy Hobco's first prong. Briefly stated, my decision rests on two factors. First, defendants have admitted that they performed no work for Safe Harbor Boat Repairs, Inc. Second, the concept of the "corporate" entity must be respected.

D. The Deferred Compensation Agreements

In her report, Magistrate Sorrentino stated that defendant's strongest argument is that the Deferred Compensation Agreements of August 10, 1979, constitute enforceable encumbrances on the property. Nevertheless, she concluded the agreements failed as contracts for lack of mutuality. On this

point, I agree with the magistrate's conclusion although I reach the result in a slightly different manner.

First, I agree that the promises made between Castro, Foltz, and Safe Harbor Boat Repairs, Inc. never became binding because Castro and Foltz never performed. In reaching this conclusion, I have relied upon defendants' own admission that no such work was ever performed. For example, during Castro's deposition, he was asked whether he worked at Safe Harbor Boat Repairs prior to going to prison to serve his sentence for marijuana trafficking. Castro acknowledged that he had not worked for Safe Harbor Boat Repair:

Q. Between August of 1979, and February of 1980 (referring to when Castro began serving his sentence), did you work at Safe Harbor Boat Repairs, Inc.?

A. No.

Castro Deposition taken September 18, 1984, at Page 58, Lines 10-12. Similarly, Foltz clearly stated that he did not work for Safe Harbor Boat REpair, Inc.

A. No. I never worked for Safe Harbor Boat Repair.

Foltz Deposition taken January 7, 1986, at Page 70, Lines 19-21. Once a defendant has clearly answered an

unambiguous question, that party must present persuasive reasons for rejecting the clear testimony. See Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc., 736 F.2d 656, 657 (11th Cir. 1984).[6]

Second, I believe that the contracts fail because the consideration was illusory. Under the deferred compensation agreements, the sole stated consideration to be provided by both defendants Castro and Foltz was their

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[6] Herrera's affidavit is insignificant. Although he saw defendants working on the property, he does not identify the corporation employing defendants. Defendants cannot argue that working for the other companies was the equivalent of working for Safe Harbor Boat Repairs, Inc., since there has been no claim that the corporate veil should be pierced. See Hobco, No. 85-3897, Slip Op. at 1110, 1115 (11th Cir. Jan. 8, 1987).

being "willing to continue in the employ of Company (Safe Harbor Boat Repairs, Inc.)." No specific accomplishment had to be performed at any time. Therefore, it is extremely difficult to determine what performance, if any, was necessary to fulfill defendants' part of the bargain. By the terms of the agreements, defendants' attitude, their willingness to work, was the consideration offered instead of any actual performance. In short, the terms of the contract suggest that Fernandez fully intended to <u>give</u> defendants an interest in the property. Unfortunately, the structure of their agreement, designed to avoid a present transfer of any interest, has left defendants with no claim against the

property.[7]

III. CONCLUSION

After considering the law and applying it to the facts of this case, I concur with the Magistrate's recommendation. I find that there are no genuine issues of material fact and plaintiff is entitled to judgement of matter of law. Thus, plaintiff's motion os GRANTED.

DONE AND ORDERED at Miami,

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[7] Two final points merit discussion. First, defendants may have a quantum merit action, but it was not asserted. Second, even if the agreements were enforceable executory contracts, they would be between Safe Harbor Boat Repairs, Inc., Fernandez and the defendants. At most, Fernandez and the company would be subject to an action for breach of contract for which the defendants could seek damages.

Florida, this 11 day of March, 1987.

_____

UNITED STATES

DISTRICT JUDGE

cc: AUSA Armstrong

William A. Meadows, Jr., Esq.

Joseph Allen III, Esq.

Thomas Tatum, Esq.

Michael Fertig, Esq.

Steve Zukoff, Esq.

SDA7 : cjm

84-1846

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1846-CIV-ATKINS

UNITED STATES OF AMERICA

Plaintiff,

vs.

CELIO CASTRO and JOSEPH A. VALDES, JR., Receiver appointed by the Circuit Court of the 6th Judicial Circuit in and for Monroe County, Florida,

and

WARREN ELECTRIC OF KEY WEST, INC., FLORIDA KEYS FIRST STATE BANK, HARRY KNIGHT, as Tax Collector for Monroe County, CLARA FERNANDEZ and LARRY FOLTZ,

Defendants.

FINAL JUDGMENT

This action was brought by the United States for injunctive and declaratory relief and to quiet title to certain real property, including all improvements thereon and appurtenances thereto, situate in Monroe County, Florida, and described as follows:

A parcel of filled and submerged land consisting of part of the area described in I.I. Deed 20793 and located southernly of Block 57 according to the plat of MacDonalds Plat of Part of Stock Island dated 1910, recorded in Plat Book 1 at page 55 of Monroe County Official Records and is more particularly

described as follows:

From the northwest corner of Block 57, according to said plat go easternly along the southernly line of Fifth Avenue a distance of 500 feet to a point, thence at right angles and southernly a distance of 2242.52 feed to a point; thence at right angles and easternly a distance of 1066.72 feet to a point which point is the point of beginning; thence continue easterly along prolongation of the previously described course a distance of 515.53 feet to a point; thence southeasternly making a deflection angle of 77 degrees 25 minutes with the prolongation of the previously described course a distance of 1536.92 feet to a point; thence

westernly making a deflection angle to 102 degrees 35 minutes with the prolongation of the previously described course a distance of 8488.36 feet to a point; thence northernly and at right angles a distance of 1500 feet back to the point of beginning. Containing 23.48 acres, more or less.

This action came before the Court, the Honorable C. Clyde Atkins, United States District Judge, presiding, and the issues raised in the proceedings have been duly heard and decisions have been duly rendered, as set forth below:

A. As to Defendants CELIO CASTRO and LARRY FOLTZ, this Court on March 11, 1987, entered an order granting Plaintiff's motion for summary judgement

in favor of the United States and against Celio Castro and Larry Foltz;

B. This action as it applies to Defendant, CLARA FERNANDEZ, was tried before this Court, and a decision was duly rendered and set forth in this Court's memorandum opinion and order entered August 25, 1987;

C. As to Defendant, WARREN ELECTRIC OF KEY WEST, INC., FLORIDA KEYS STATES BANK, and HARRY KNIGHT, as Tax Collector for Monroe County, said defendants and Plaintiff have stipulated to entry of judgement as set forth herein;

D. The claims and defenses of Defendant, JOSEPH A. VALDES, JR., Receiver appointed by the Circuit Court of the Judicial Circuit in and for Monroe County, Florida, have been resolved by the above-stated decisions and

adjudications, and by this Court's order of injunction entered September 28, 1984;

E. The third party action in this lawsuit, filed by CELIO CASTRO and LARRY FOLTZ against GUSTAVO FERNANDEZ, has been rendered moot by the above-stated decisions and adjudications:

WHEREFORE, it is ORDERED AND ADJUDGED:

1. That sole and complete title to said real property is hereby declared and adjudged to be vested exclusively in Plaintiff, THE UNITED STATES OF AMERICA, in fee simple absolute, subject only to the liens set forth in paragraphs 2 through 4 below, which liens are in the priority with which they are set forth below;

2. That Monroe County, Florida, which appears in this lawsuit by and

through Defendant, HARRY KNIGHT as Tax Collector for Monroe County, has a tax lien on said real property, and under that lien is due unpaid taxes of $26,200.57, is due unpaid accrued interest through April 30, 1988 totaling $19,264.96, and is due additional interest of $12.92 per day from May 1, 1988 through the date that said lien is satisfied. Payment of the above amounts shall constitute complete satisfaction of said lien. Said lien is to be satisfied from the proceeds the sale said real property, and upon such satisfaction said Defendant is directed to record notice of the complete satisfaction of said lien in the appropriate public records.

3. That Defendant, FLORIDA KEYS FIRST STATE BANK (now know as FIRST STATE BANK), has a first mortgage lien on said

real property, and under that lien, is due principal in the amount of $246,692.26, is due accrued interest through April 30, 1988 totalling $216,363.63, and is due additional interest of $108.14 per day from May 1, 1988 through the date that said lien is satisfied. Payment of the above amounts shall constitute complete satisfaction of said lien. Said lien is to be satisfied from the proceeds from the sale of said real property, and upon such satisfaction said Defendant is directed to record notice of the complete satisfaction of said lien in the appropriate public records.

4. That Defendant, WARREN ELECTRIC OF KEY WEST, INC., has a lien on said real property, and under that lien is due principal in the amount of $70,000.00, is

due accrued interest through April 30, 1988 totalling $7,763.29, and is due additional interest of $15.34 per day from May 1, 1988 through the date that said lien is satisfied. Payment of the above amounts shall constitute complete satisfaction of said lien. Said lien is to be satisfied from the proceeds from the sale of said real property, and upon such satisfaction said Defendant is directed to record notice of the complete satisfaction of said lien in the appropriate records.

5. That Defendant, CELIO CASTRO, is hereby declared and adjudged to have no right, title, or interest in or to said real property;

6. That Defendant, LARRY FOLTZ, is hereby declared and adjudged to have no right, title, or interest in or to said

real property;

7. That Defendant, JOSEPH VALDES, JR., is hereby declared and adjudged to have no right, title, or interest in or to said real property;

8. That Defendant, CLARA FERNANDEZ, is hereby declared and adjudged to have no right, title, or interest in or to said real property;

9. That Defendants, CELIO CASTRO and JOSEPH A. VALDES, JR., as court appointed receiver, or any replacement or substitute receiver or officer appointed by the Circuit Court of the 16th Judicial Circuit in and for Monroe County, Florida, are hereby enjoined from entering, dispossessing, or in any way interfering with the ownership, use, occupation, enjoyment and benefit of the United States of America of said real

property;

10. That Plaintiff United States of America's title to said real property be, and the same is hereby quieted and established, and the claims or alleged claims of the defendants, other that those liens set forth in paragraphs 2 through 4 above, are hereby barred, removed and adjudged not to constitute clouds upon the plaintiff's title to said land.

11. That any right, title or interest of the defendants, other than those liens set forth in paragraphs 2 through 4 above, are hereby cancelled and annulled.

12. That the third-party action in this lawsuit, filed by CELIO CASTRO and LARRY FOLTZ against GUSTAVO FERNANDEZ, is hereby dismissed with prejudice and that

Defendants/Third Party Plaintiffs, CELIO CASTRO and LARRY FOLTZ, take nothing by their third party action against Third Party Defendant, GUSTAVO FERNANDEZ.

DONE AND ADJUDGED in Miami, Florida, on September 27, 1988.

UNITED STATES DISTRICT JUDGE

Copies to :

Samuel D. Armstrong, AUSA

Stephen M. Zukoff, Esq.

Joel S. Perwin, Esq.

Michael Fertig, Esq.

Thomas R. Tatum. Esq.

William A. Meadows, Esq.

Joseph B. Allen, III, Esq.

Jose Martinez, Esq.

Ms. Clara Fernandez

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6010

D.C. Docket No. 84-1846

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CELIA CASTRO,
LARRY FOLTZ,
Defendants/Third-Party Plaintiffs-Appellants,

JOSEPH A. VALDES, JR., etc., et al.,
Defendants,

versus

GUSTAVO FERNANDEZ,
Third-Party Defendant-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(September 28, 1989)

BEFORE: FAY and KRAVITCH, Circuit Judges, and CASTAGNA, District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1. "Costs taxed against defendants/third-party plaintiffs-appellants."

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*Honorable William J. Castagna, U.S. District Judge for the Middle District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6010

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CELIA CASTRO,
LARRY FOLTZ,
Defendants/Third-Party Plaintiffs-Appellants,

JOSEPH A. VALDES, JR., etc., et al.,
Defendants,

versus

GUSTAVO FERNANDEZ,
Third-Party Defendant-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(November 6, 1989)

BEFORE: FAY and KRAVITCH, Circuit Judges, and CASTAGNA, District Judge.

PER CURIAM: The petition(s) for rehearing filed by appellants, Celia Castro and Larry Foltz, is denied.

ENTERED FOR THE COURT:
PHYLLIS KRAVITCH
United States Circuit Judge
*Honorable William J. Castagna, U.S. District Judge for the Middle District of Florida, sitting by designation.

Judgment Entered: September 28, 1989
For the Court: Miguel J. Cortez, Clerk
By: Karleen McNabe
Deputy Clerk